

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

TRACI MCNEIL,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
LORI KOCH, et al.,	:	
Defendants,	:	NO. 98-4578
	:	
Newcomer, J.	:	February , 1999

M E M O R A N D U M

Presently before the Court are defendants' Motion for Summary Judgment, plaintiff's response thereto, and defendants' reply thereto. For the reasons that follow, said Motion will be granted in part and denied in part.

A. Background

On August 29, 1997, plaintiff Traci McNeil went to the 1800 block of Arch Street in Norristown, Pennsylvania in search of her children whom she believed were with her husband. She asked a friend to call the police for assistance. Police were dispatched to the location where plaintiff was searching for her children. Meanwhile, when plaintiff knocked on the door of a building at this location to get her husband's attention, another woman exited the building and confronted the plaintiff. Plaintiff and the other woman then engaged in a physical altercation, involving rolling around on the ground and swinging a crutch at one another. The police apparently arrived right about the time of the altercation between plaintiff and the third woman. According to plaintiff, although a witness identified plaintiff to the police, defendant police officers Lori Koch and

Robert Langdon approached, and defendant Langdon pepper-sprayed plaintiff in her face without any verbal warning. According to defendants, both officers yelled warnings and commands to the two women before using the pepper spray. Defendant Koch then placed plaintiff under arrest for disorderly conduct. Plaintiff was taken to the station in a police vehicle, acutely suffering from the effects of the pepper spray. Eventually plaintiff was found not guilty of the charge of disorderly conduct.

In Count I of her Amended Complaint, plaintiff asserts a claim under 42 U.S.C. § 1983 against defendant Koch for false arrest, malicious prosecution, denial of medical attention, and failure to intervene in the use of excessive force by defendant Langdon. In Count II plaintiff asserts supplemental state law claims for false arrest, malicious prosecution, and intentional infliction of emotional distress against defendant Koch. In Count III, plaintiff asserts a claim under 42 U.S.C. § 1983 against defendant Langdon for use of excessive force, failure to intervene in the unlawful arrest of plaintiff, and denial of medical attention; and in Count IV asserts state law claims against Langdon for assault and battery, false arrest, and intentional infliction of emotional distress. In Count V, plaintiff asserts a claim under 42 U.S.C. § 1983 against the Borough of Norristown for maintaining a policy or custom which caused the individual defendants to violate plaintiff's constitutional rights. And finally, in Count VI, plaintiff brings a state law claim against the Borough for negligently

hiring the individual defendants. Defendant now moves for summary judgment on all of plaintiff's claims.

B. Summary Judgment Standard

A reviewing court may enter summary judgment where there are no genuine issues as to any material fact and one party is entitled to judgment as a matter of law. White v. Westinghouse Elec. Co., 862 F.2d 56, 59 (3d Cir. 1988). The evidence presented must be viewed in the light most favorable to the non-moving party. Id. "The inquiry is whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one sided that one party must, as a matter of law, prevail over the other." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). In deciding the motion for summary judgment, it is not the function of the Court to decide disputed questions of fact, but only to determine whether genuine issues of fact exist. Id. at 248-49.

The moving party has the initial burden of identifying evidence which it believes shows an absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); Childers v. Joseph, 842 F.2d 689, 694 (3d Cir. 1988). The moving party's burden may be discharged by demonstrating that there is an absence of evidence to support the nonmoving party's case. Celotex, 477 U.S. at 325. Once the moving party satisfies its burden, the burden shifts to the nonmoving party, who must go beyond its pleadings and designate specific facts, by use of affidavits, depositions, admissions, or answers to

interrogatories, showing that there is a genuine issue for trial. Id. at 324. Moreover, when the nonmoving party bears the burden of proof, it must "make a showing sufficient to establish the existence of [every] element essential to that party's case." Equimark Commercial Fin. Co. v. C.I.T. Fin. Servs. Corp., 812 F.2d 141, 144 (3d Cir. 1987) (quoting Celotex, 477 U.S. at 322). Summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." White, 862 F.2d at 59 (quoting Celotex, 477 U.S. at 322).

C. Discussion

In the first instance, plaintiff states that she is not contesting defendants' Motion with respect to her claims for denial of medical assistance, her claim for intentional infliction of emotional distress, and her claim for negligent hiring against the Borough. Accordingly, summary judgment will be entered in favor defendants and against plaintiff on those claims. Plaintiff does, however, contest defendants' Motion with respect to the remaining claims.

1. False Arrest

Defendants first argue that plaintiff's false arrest and malicious prosecution claims against defendant Koch cannot stand because the defendant officers had probable cause, as a matter of law, to arrest and prosecute plaintiff for disorderly conduct. Under the Pennsylvania Crime Code,

intent A person is guilty of disorderly conduct if, with
 to cause public inconvenience, annoyance or alarm, or
 recklessly creating a risk thereof, he:
 (1) engages in fighting or threatening, or in violent
 or tumultuous behavior;
 (2) makes unreasonable noise; or
 (3) uses obscene language, or makes an obscene gesture.

18 Pa. Cons. Stat. Ann. § 5503. The proper inquiry in a § 1983 claim based on false arrest "is not whether the person arrested in fact committed the offense but whether the arresting officers had probable cause to believe the person arrested had committed the offense." Dowling v. City of Phila., 855 F.2d 136, 141 (3d Cir. 1988). Probable cause has been defined as the facts and circumstances sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense. Sharrar v. Felsing, 128 F.3d 810, 817-18 (3d Cir. 1997). A court must look at the "totality of the circumstances" and use a "common sense" approach to the issue of probable cause. Id. at 818. Generally, the existence of probable cause is a factual issue to be determined by a jury, but "where no genuine issue as to any material fact exists and where credibility conflicts are absent, summary judgment may be appropriate." Deary v. Three Un-Named Police Officers, 746 F.2d 185, 191-92 (3d Cir. 1984). The question is for the jury only if there is sufficient evidence whereby a jury could reasonably find that the police officers did not have probable cause to arrest. Id. at 190. According to defendants in the instant case, it is uncontested that plaintiff was engaged in a physical altercation with another person at the time that the officers arrived on the scene, and that therefore

as a matter of law defendant police officers had probable cause to arrest plaintiff.

The facts surrounding the incident appear to be somewhat confused, even in the plaintiff's recollection, but it is indeed uncontested by plaintiff that as the officers were approaching the scene, she and another woman were engaged in a physical struggle, to the point of "rolling on the ground . . . trying to . . . shake [a] crutch back and forth." (Pl.'s Resp. at Exh. A, p.29.) Plaintiff argues, in turn, that she was defending herself from the other woman's attack, that she had summoned the police for help in locating her children, and that the police knew that she was the one who had summoned them for help. However, the undisputed facts surrounding the altercation show that plaintiff was engaged in a physical fight with the other woman, that plaintiff swung the crutch and hit the other woman, and that they were rolling on the ground together. Furthermore, it is uncontested that this occurred in public, and that the defendant officers were on the scene.

In view of these undisputed facts, the Court is satisfied that a jury could not reasonably find that the defendant officers did not have probable cause to arrest plaintiff for disorderly conduct. This crime took place before their very eyes. Furthermore, for purposes of a probable cause analysis, plaintiff's claim that she was merely defending herself is irrelevant in view of the undisputed facts. Even if she had told the officers what she is now claiming to the Court--that she

fought the other woman and swung the crutch at her in self-defense--the officers still would undeniably have had probable cause to arrest her given her undisputed conduct. That plaintiff had originally summoned the police for help, and that the police were made aware of this fact is also irrelevant in light of the fact that she and the other woman were engaged in a fight, rolling on the ground, and swinging a crutch. Whether or not self-defense is a viable defense for disorderly conduct, the Court is satisfied that as a matter of law the defendant officers had probable cause to arrest plaintiff and prosecute her for disorderly conduct. Accordingly, defendants' Motion will be granted with respect to plaintiff's false arrest and malicious prosecution claims,¹ both under § 1983 and under state law. Likewise, the Motion will be granted as to her claim against defendant Langdon for failure to intervene in the unlawful arrest.

2. Excessive Force

Next, defendants move for summary judgment on plaintiff's claim against defendant Langdon for use of excessive force. "An excessive force claim under § 1983 arising out of law

¹ A civil action for malicious prosecution under § 1983 requires that: (1) the defendant initiate a criminal proceeding; (2) which ends in plaintiff's favor; (3) which was initiated without probable cause; and (4) the defendant acts maliciously or for a purpose other than bringing the plaintiff to justice. Rose v. Bartle, 871 F.2d 331, 349 (3d Cir. 1989). As the Court finds that probable cause did exist for arresting plaintiff for disorderly conduct, likewise, the Court finds that prosecution for disorderly conduct was initiated with probable cause.

enforcement conduct is based on the Fourth Amendment's protection from unreasonable seizures of the person." Groman v. Township of Manalapan, 47 F.3d 628, 633 (3d Cir. 1995). Ordinarily, police officers are privileged to commit a battery pursuant to a lawful arrest, but the privilege is lost by the use of excessive force. Id. at 634. When a police officer uses force to effectuate an arrest, that force must be reasonable. Id. The reasonableness of the officer's use of force is measured by "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Id. The reasonableness inquiry is objective, but should give appropriate scope to the circumstances of the police action. Id. Summary judgment is appropriate if, as a matter of law, the evidence would not support a reasonable jury in finding that the police officers' actions were objectively unreasonable. Id.

In the instant case, the Court is satisfied that sufficient evidence exists from which a jury could reasonably find that defendant Langdon's actions were objectively unreasonable. According to plaintiff's deposition testimony, not only did the defendant fail to utter any verbal or other warning before applying the pepper spray, but furthermore, the altercation at that point had stopped. Indeed, plaintiff testified that she raised her arms and pleaded "no" when she saw

officer Langdon approach with the pepper spray. Officer Langdon's version of the facts is quite different, but this simply underscores the fact that this claim is not amenable to summary judgment. Moreover, in Groman, the Third Circuit concluded that the crimes of disorderly conduct and resisting arrest were not "particularly severe" and that therefore a jury could determine that the plaintiff did not present a serious threat. See id. Accordingly, plaintiff's excessive force claim against defendant Langdon remains, as does her state law claim for assault and battery.

3. Failure to Intervene

Next, defendants argue that summary judgment must be granted in their favor on plaintiff's failure to intervene claim.² A law enforcement officer has an affirmative duty to intercede on behalf of a citizen whose constitutional rights are being violated in his presence by other officers. O'Neill v. Krzeminski, 839 F.2d 9, 11 (2d Cir. 1988); see also Byrd v. Clark, 783 F.2d 1002, 1007 (11th Cir. 1986) (excessive force); Webb v. Hiykel, 713 F.2d 405, 408 (8th Cir. 1983) (excessive force); Gagnon v. Ball, 696 F.2d 17, 21 (2d Cir. 1982) (false arrest); Bruner v. Dunaway, 684 F.2d 422, 426 (6th Cir. 1982), cert. denied, 459 U.S. 1171 (1983) (excessive force). A defendant becomes liable for use of excessive force by failing to

² In view of the Court's holding with respect to plaintiff's false arrest claim, the only remaining failure to intervene claim is asserted against defendant Koch for failure to intervene in defendant Langdon's use of excessive force.

intercede if that failure was the proximate cause of the use of excessive force on the plaintiff. O'Neill, 839 F.2d at 11. In other words, if there has been a predicate finding of use of excessive force by another officer, the episode must be of "sufficient duration to support a conclusion that an officer who stood by without trying to assist the victim became a tacit collaborator." Id. at 11-12. Thus, though defendant Koch is not a "guarantor" of plaintiff's safety, she may be held liable for the use of excessive force if she deliberately choose not to make a reasonable attempt to stop defendant Langdon from using excessive force. See id. at 12.

The Court finds that plaintiff has produced sufficient evidence to permit this claim to go to a jury. Although defendants argue that there was insufficient time for officer Koch to intervene in officer Langdon's use of pepper spray, more telling is defendant Koch's own testimony that she had her own pepper spray out and that officer Langdon was the one to spray the two women "because he was first closest to the individuals." (Pl.'s Resp. at Exh. C, p.66.) Defendant Koch also appears to remember seeing defendant Langdon's pepper spray. From this, a jury could infer not only that Koch had time to stop Langdon, but furthermore that defendant Koch herself was also ready to use the pepper spray. Thus the Court finds that in the event that a jury determines that defendant Langdon used excessive force in applying pepper spray on the plaintiff, there is sufficient evidence from which a jury could also conclude that defendant

Koch was a "tacit collaborator" in the use of excessive force. Accordingly, the Motion will be denied with respect to this claim.

4. Qualified Immunity

Next, defendants assert the defense of qualified immunity. Defendants are qualifiedly immune from suits brought against them for damages under § 1983 "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Sherwood v. Mulvihill, 113 F.3d 396, 398-99 (3d Cir. 1997) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). Thus defendants are entitled to qualified immunity if, at the time they acted, they reasonably could have believed that their conduct did not violate the plaintiff's clearly established constitutional rights. Mellot v. Heemer, 161 F.3d 117, 121 (3d. Cir 1998). Where a defendant asserts a qualified immunity defense in a motion for summary judgment, the plaintiff bears the initial burden of showing that the defendant's conduct violated some clearly established statutory or constitutional right. Sherwood, 113 F.3d at 399. Only if the plaintiff carries this initial burden must the defendant then demonstrate that no genuine issue of material fact remains as to the "objective reasonableness" of the defendant's belief in the lawfulness of his actions. Id. While the qualified immunity defense is frequently determined by courts as a matter of law, a jury should decide disputed factual issues relevant to that determination. Karnes v. Skrutski, 62 F.3d 485,

491 (3d Cir. 1995).

In the instant case, the Court finds that the facts surrounding the excessive force claim are in dispute, and that therefore the Court cannot make a determination on defendants' qualified immunity defense at this time. If a jury determines that the plaintiff's version of the facts are true, that is, that defendants offered no verbal warning, that plaintiff actually withdrew from the fight in time for officer Langdon not to use his pepper spray, and in fact raised her arms and pleaded "no" when she saw officer Langdon about to spray her, then the Court cannot say that defendants' conduct was objectively reasonable. On the other hand, if, as the defendants contend, they shouted verbal warning and commands to stop fighting at the plaintiff, and only used the pepper spray to break up the fight, then their actions could have been reasonable. In any event, the facts are in such dispute that defendants' motion as to their qualified immunity defense must be denied at this time.

5. Municipal Liability

Finally, defendants argue that plaintiff's claim against the Borough for the existence of a de facto policy cannot stand. Under § 1983, municipal defendants cannot be held liable under a theory of respondeat superior. Montgomery v. DeSimone, 159 F.3d 120, 126 (3d. Cir 1998); Monell v. Department of Social Servs. of City of New York, 436 U.S. 658, 691-94 (1978). Instead, municipal liability only arises when a constitutional deprivation results from an official custom or policy.

Montgomery, 159 F.3d at 126. "[A] municipality's failure to train police officers only gives rise to a constitutional violation when that failure amounts to deliberate indifference to the rights of persons with whom the police come into contact." Id. at 126-27. Furthermore, a failure to train, discipline, or control can only form the basis for § 1983 municipal liability "if the plaintiff can show both contemporaneous knowledge of the offending incident or knowledge of a prior pattern of similar incidents and circumstances under which the supervisor's actions or inaction could be found to have communicated a message of approval to the offending subordinate." Id. at 127.

In the instant case, plaintiff seeks to proceed against the Borough of Norristown on the theory that the Borough failed to train and supervise their police officers in the use of pepper spray, and that this failure led to the deprivation of plaintiff's constitutional right to be free from the use of excessive force. To this end, plaintiff relies upon an expert report which purports to conclude that the Borough's policy makers consciously disregarded the implementation of their own policy with respect to training officers on the use of pepper spray. However, even if the Court accepts as true for purposes of the instant Motion that the Borough did not follow their own written policies as to the follow-up training of officers in the use of pepper spray, this claim nevertheless cannot stand because plaintiff has not shown contemporaneous knowledge of the offending incident or knowledge of a prior pattern of similar

incidents, and circumstances under which the supervisor's actions or inaction could be found to have communicated a message of approval to the offending subordinate. In particular, plaintiff has not produced any evidence to show that the policy makers of the Borough of Norristown were deliberately indifferent to their officers' use of pepper spray which deprived citizens of their constitutional rights. Merely to show that a written policy was not followed to the letter cannot be taken as evidence that the policy makers knew of incidents where citizen's rights had been violated by the unconstitutional use of pepper spray, and that they deliberately ignored the situation. Indeed, plaintiff's claim merely seeks to impose respondeat superior liability on the Borough, and that cannot be permitted. Accordingly, defendants' Motion will be granted with respect to this claim.

D. Conclusion

In conclusion, Defendant's Motion for Summary Judgment will be granted in part and denied in part for the aforementioned reasons.

An appropriate Order follows.

Clarence C. Newcomer, J.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

TRACI MCNEIL,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
LORI KOCH, et al.,	:	
Defendants,	:	NO. 98-4578

O R D E R

AND NOW, this day of February, 1999, upon consideration of defendants' Motion for Summary Judgment, plaintiff's response thereto, and defendants' reply thereto, it is hereby ORDERED that said Motion is GRANTED in part and DENIED in part. The Motion is GRANTED as to Counts II, V, and VI in their entirety, and on plaintiff's claims for false arrest, malicious prosecution, failure to intervene in unlawful arrest, denial of medical attention, and intentional infliction of emotional distress. The Motion is DENIED as to the remaining claims: Count I's failure to intervene claim against defendant Koch, Count III's excessive force claim against defendant Langdon, and Count IV's assault and battery claim against defendant Langdon.³

It is further ORDERED that JUDGMENT is ENTERED in favor of defendants and against plaintiff on Counts II, V, and VI in their entirety, and on plaintiff's claims for false arrest, malicious prosecution, failure to intervene in unlawful arrest,

³ Accordingly there are no remaining claims against the Borough of Norristown.

denial of medical attention, and intentional infliction of emotional distress. The claims that remain for trial disposition are Count I's failure to intervene claim against defendant Koch, Count III's excessive force claim against defendant Langdon, and Count IV's assault and battery claim against defendant Langdon.

AND IT IS SO ORDERED.

Clarence C. Newcomer, J.